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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 588

HLH PRODUCTS, DIVISION OF HUNT OIL CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Statute:

Labor Management Relations Act, 61 Stat. 136, *et seq.* (1947), 29 U.S.C. § 151, *et seq.*:
Section 8(a)(1) 2, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18
Section 8(a)(3) 2, 7, 8, 9, 10, 11, 13, 15, 16, 18
Section 8(a)(5) 8, 9, 10, 15, 16
Section 10(b) 2, 11, 12, 13, 14

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Petitioner, HLH Products, Division of Hunt Oil Co., prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on June 6, 1968.

Opinions Below

The opinion of the Court of Appeals is unofficially reported at 68 LRRM 2454. The opinion is printed in the Appendix hereto at page 21a. The opinion of the National Labor Relations Board is reported at 164 NLRB No. 61, and is printed in the Appendix at page 19a.

Jurisdiction

The decision of the Court of Appeals was entered on June 6, 1968. An order denying a petition for rehearing

was entered on July 8, 1968. The decree of the Court of Appeals was entered on July 8, 1968. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Question No. 1

When a company adopts a nondiscriminatory plan to reopen and restaff its plant, may the Board find a violation for failure to recall old employees which is inescapably grounded on events occurring prior to the limitations period under Section 10(b)?

Question No. 2

Where it is found that a company has, for discriminatory reasons, failed to recall old employees, and there is no showing that the traditional remedies of reinstatement, back pay, and posting of notices will be inadequate, is an order directing bargaining appropriate?

Statute Involved

The statute involved is the Labor Management Relations Act, 61 Stat. 136, et seq. (1947), 29 U.S.C. § 151, et seq. The specific sections involved are 8(a)(1) and (3) and 10(b). They are set forth in the Appendix at page 28a.

Statement Of The Case

The Facts

Petitioner (hereinafter called the "Company"), is engaged in the food processing business and operates a plant in Muncie, Indiana. The plant was purchased by the Company in December, 1961. (J.A. 339) [1]

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1. "J.A." refers to the joint appendix filed in the Court below.

At the time of the purchase, Local 135 of the Teamsters was the bargaining representative. Within a year after the Company's acquisition of the plant, petitioner and Local 135 of the Teamsters executed a collective bargaining agreement. (J.A. 339, 367) Among other provisions, such contract established plant-wide seniority and provided that filling jobs and layoffs were to be done according to seniority. (J.A. 367) The terms and provisions of this contract expired in accord with the term of the contract on March 31, 1964. (J.A. 339)

Since the expiration of the 1962 contract, no collective bargaining agreement has been in effect at the Company's Muncie plant. (J.A. 373-74) After the expiration of the contract, a decertification election was held and Local 135 of the Teamsters won the election and became the certified bargaining representative. (J.A. 203, 361-64) Following the election, the Company and the Union entered into negotiations for a new contract, but an agreement was never signed. (J.A. 341, 348-49, 358)

Petitioner's Muncie plant was closed on February 4, 1965. Three to five truckloads of potatoes in the warehouse and some machinery were shipped to the Company's plant at Alma, Arkansas. Other inventory on hand and quality control equipment were shipped to a plant about 40 miles from Muncie. (J.A. 341-42)

When the plant was closed, the plant manager told the assistant union steward and the union steward the plant was going to cease operations and that it looked like it was permanent. He also told some employees that the shutdown was to be permanent. (J.A. 110-11, 250) On February 4, 1965, a notice was posted stating that as of that day at the end of the shift, "this plant will cease operation." (J.A. 365) When the plant was closed, the employees were considered terminated and accrued vacation benefits were paid. Such accrued benefits were not paid on temporary layoffs. (J.A. 60-61)

Within a month and a half after the plant was shut down, a decision was made that the plant should be sold. Following this decision, contacts were made with prospective purchasers of the Muncie facility. (J.A. 234, 264) In mid-March, 1965, an attorney for the Company carried on negotiations with a local group. He had authority to prepare the necessary legal documents and commit the Company to a sale of the plant on the proposed terms. (J.A. 264-65)

The attorney, John Livingston, contacted a representative of the group of Muncie citizens interested in buying the plant, but Mr. Livingston was informed that the group had decided not to buy the plant at that time. Two of the reasons given to Mr. Livingston for the group's decision not to buy were that the plant was shut down and the Company had failed to contract with local growers for a crop of tomatoes for the ensuing canning season. (J.A. 265-66) It was decided that other prospective purchasers would feel the same way, and that a crop of tomatoes should be planted so a prospective purchaser could operate the plant the next season with a crop of tomatoes available. Mr. Livingston was advised to make an effort to get a crop planted, even though the usual time for doing so had passed. (J.A. 267-268)

Following some difficulty, Keith Sparks, who had been the Company's former manager, was rehired and he arranged to get a crop of tomatoes in the ground. (J.A. 283-85, 342)

After Mr. Sparks was hired on April 1, 1965, and a crop of tomatoes arranged for, it began to appear possible that either the Company or a purchaser would operate a tomato pack in the summer of 1965. (J.A. 277, 342) However, a sale of the plant not having been consummated, a decision was made in June or by mid-July that the Company would run a tomato pack at Muncie in 1965, and

new plant manager John Volz was instructed by the Company president on July 15, 1965, to recruit labor for the processing of tomatoes. (J.A. 278-79, 315-16, 236, 342)

When the possibility of running a tomato pack at Muncie became apparent, Mr. Volz, new plant manager, became concerned about how he was going to restaff the plant. Volz inquired of the Indiana Employment Security Division about recruiting farm as well as in-plant workers. The role which could be played by Employment Security was explained and sample recruitment letters were sent to company officials in Dallas for approval. (J.A. 277-78, 401-03)

The letter for solicitation of in-plant workers stated that applications would be taken at the office of the Employment Security Division in Muncie. Office help in the Muncie plant was short at the time, and the office workers were not free to process applications. (J.A. 278) Employment Security accumulated a pool of available workers coded according to work preferences. The Company could then place a single phone call to Employment Security and any number of previously screened applicants would appear for work. The need for the screening of applications by Company personnel was eliminated, and the services provided by the Employment Security Division were performed at no cost to the Company. (J.A. 296-97, 328-29)

When it was decided that the Company would run the Muncie plant through the tomato season, Volz gave instruction to see that a list of former employees was prepared and delivered to Employment Security so that recruitment letters could be mailed. (J.A. 279)

It was decided that the 1964 earnings records would be used to compile a list of names of people who might be interested in working. (J.A. 285-86) Certain groups of employees were omitted from the list. The names of truck

drivers were not included; the names of employees working at the Company at the time were not placed on the list; the names of employees whose addresses did not appear on the earnings cards were not put on the list. (J.A. 306-07)

The list was delivered to Employment Security around July 20, 1965. (J.A. 286-87, 302, 317) Letters were sent to all the persons on the list except a few who were marked off by Sparks. Those marked off were people who ordinarily were field help, not factory help. Letters were not sent to those persons listed with out-of-Indiana addresses. Some of the letters were returned. (J.A. 291-92, 287)

The letter sent to the persons on the list advised that the Company needed men and women to process tomatoes. The recipient was invited to apply at the Indiana Employment Service in Muncie on July 22 and 23, 1965. (J.A. 387) Employment Security also ran an advertisement in the Muncie newspaper and hired radio time to publicize the availability of jobs in canning plants. (J.A. 342, 292) A pool of workers was created for referral to the Company when workers were needed and the pool was available to any food processors needing workers. (J.A. 503, 342)

When an order came in for workers from the Company, a clerk at Employment Security went to the group coded for food processors and pulled the requested number of cards. If registrants happened to be in the Employment Security office when the work order came in, these registrants were referred to the Company. (J.A. 292-93) After picking a group of cards from the file, telephone calls were made to the persons listed on the card. If there was a response to the phone call, the registrant was referred to the Company. If there was no response to the phone call, the next person in the group of cards was called until the required number had been referred. (J.A. 300)

There were no requests from the Company that specific persons be referred or not referred. No requests for per-

sons by name were made. Requests were invariably made for so many workers, or particular job classifications. (J.A. 293, 303-04, 317-18, 328)

Instructions were given to the Company employment representative to hire the people who were felt to be best qualified to do the job, disregarding seniority. (J.A. 317-18, 309-10) Carrying out these instructions, the criteria used in determining whether to hire a particular applicant were whether there was an opening available in the plant, next, whether the applicant was presently available, and finally, whether the applicant was best qualified of all the applicants for the opening. (J.A. 318)

The Company talked to more than 700 people and hired about 600 during the tomato pack of 1965. These figures include the peelers who were excluded from the bargaining unit. (J.A. 327, 344) Because of the indefinite status of the Muncie operation, each applicant was told the work would be seasonal. (J.A. 54, e.g. 118, 140)

At the time the plant was reopened, it had been shut down for five months, and each person requesting work at the plant, except the peelers, was required to fill out an application. (J.A. 54-55, 344) During the prior nine years, layoffs had never been longer than six to eight weeks. (J.A. 58-59) Following these layoffs employees had been recalled by telephone or postcard notice. J.A. e.g. 119, 123, 132)

Thirty-nine former employees were rehired after July 17, 1965. All these employees had paid union dues under the 1962 contract, and a majority of them had signed check-off authorizations. (J.A. 367, 388) Prior to the plant closing the bargaining unit had about 100 employees. (J.A. 346)

On November 2, 1965, a charge was filed with the Board charging violations of Section 8(a)(1) and (3) of the Act. (J.A. 6) A complaint was issued in December, 1965, and

on April 19, 1966, an amended charge was filed alleging a refusal to bargain, and an amended complaint was filed alleging violations of Section 8(a)(5). The violation of Section 8(a)(3) was alleged to be the failure of the Company to recall and reemploy former employees who were named as discriminatees.

The Trial Examiner's Decision [2]

The Trial Examiner found that the employees working for the Company at the time of the plant closing constituted a competent work force, that "seasoned men are better than greenhands," and that prior to February, 1965, it was the Company's practice to recall employees by telephone or postcard. (App. 8a) He found that the Company did not accord old employees priority of referral, and that under those circumstances, and "evaluated against . . . [the Company's] sponsorship of a decertification petition and its threats before the July, 1964, election to close the Muncie plant if the Union won the election" the Company "failed to recall and reemploy the workers employed before the shutdown . . . because it knew that most of them were union supporters and it wanted to keep the Union out of the plant." (App. 9a)

The Trial Examiner also found that since the Company "denied the complainants priority of employment for anti-union reasons" he found "no merit in its argument that the method it adopted to restaff its plant by referral from the Indiana Employment Security Division did not discriminate against union applicants." (App. 11a)

The Trial Examiner further found violations of Section 8(a)(1), and a violation of Section 8(a)(5) by the Company's refusal to bargain with the Union concerning recall of employees in July, 1965. He recommended rein-

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2. Printed in the Appendix beginning at page 1a.

statement of the 65 complainants, and that the Company bargain with the Union upon request. (App. 13a)

The Decision of the National Labor Relations Board[3]

The board affirmed the Trial Examiner, but went on to find that the "discriminatory recall policy" itself constituted a refusal to bargain, and found it unncessary to pass on the Trial Examiner's reasoning behind his finding of a violation of Section 8(a)(5). The Board based its bargaining order upon the Section 8(a)(5) violation. That finding was in turn based upon the Section 8(a)(1) and (3) activity found by the Trial Examiner. It also stated:

> "An affirmative order would in any event be required here to restore the status quo ante and to remedy the 8(a)(1) and (3) violations we have found because the Respondent's conduct clearly evinces a rejection of its duty to bargain collectively as evidenced by the flagrant 8(a)(1) and (3) conduct which we have found." (App. 20a)

The Court of Appeals Decision[4]

The Court of Appeals affirmed. It found the Trial Examiner's finding of a violation of Section 8(a)(3) supported by substantial evidence in the record as a whole. In its discussion of the finding of a refusal to bargain and the order to bargain, the Court examined the Board's finding of a Section 8(a)(5) violation, and the Board's further statement that the violations of Section 8(a)(1) and (3) required an affirmative bargaining order. The Court held:

> "Both lines of reasoning asserted by the board make sense in the circumstances of this case. We choose to rest our decision, enforcing the order, including the requirement to bargain, upon the latter." (App. 25a)

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3. Printed in the Appendix beginning at page 19a.
4. Printed in the Appendix beginning at page 21a.

The Dissenting Opinion[5]

Senior Circuit Judge Knoch dissented in part. He felt that the Board's finding of a violation of Section 8(a)(5) based upon the recall policy was unreasonable and that it was for this reason that the majority chose to rely upon the Section 8(a)(1) and (3) findings to justify the bargaining order. He went on to state:

> "However, absent a finding of a § 8(a)(5) violation, I believe that a bargaining order is an appropriate remedy only:
>
> 'In those exceptional cases where the employer's unfair labor practices are so outrageous and pervasive and of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies . . . .' *NLRB v. S.S. Logan Packing Co.*, 4 Cir., 1967, 386 F.2d 562, 570.
>
> "See also *NLRB v. River Togs, Inc.*, 2 Cir., 1967, 382 F.2d 198; *NLRB v. Flomatic Corp.*, 2 Cir., 1965, 347 F.2d 74, 77.
>
> "I cannot agree that this is such an exceptional case that a bargaining order is justified as an appropriate remedy for the § 8(a)(1) and (3) violations which were found." (App. 26a-27a)

Reasons For Granting The Writ

Question No. 1

The Board's specific finding of a violation of § 8(a)(3) was that the Company refused to recall and reemploy sixty-five employees because of their union activity. The supporting findings were as follows: (1) In light of the Company's practice of recalling "laid-off" employees by telephone or postcard and the fact that seasoned men are better than greenhands, it "seems" that the Company would

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5. Printed in the Appendix beginning at page 26a.

have recalled its old employees when it reopened. (2) Anti-union statements were made to several former employees. (Only two isolated statements were found to be in violation of § 8[a][1]). (3) The Company sponsored a decertification petition and threatened to close the plant. These were all the reasons listed by the Trial Examiner in support of his conclusion as adopted by the Board.

Section 10(b) of the Act provides in pertinent part:

> "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board, and the service of a copy thereof upon the person against whom such charge is made * * *."

The original charge alleging § 8(a)(3) violation was filed on November 2, 1965. Therefore, the "cut-off date" in this case under Section 10(b) is May 2, 1965. Of the reasons stated by the Trial Examiner, only the five isolated "anti-union" statements occurred within the six-months period, and only *two* of these were sufficient to be found § 8(a)(1) violations. Every other *fact* relied upon by the Trial Examiner, and necessarily by the Court below, occurred outside the § 10(b) limitations period.

Furthermore, it is clear that the acts which occurred prior to the cut-off date were the basis for the Trial Examiner's finding, and were controlling. The opinion of the Court of Appeals also is clearly grounded upon facts outside the § 10(b) period. It makes reference to the finding "that anti-union statements were made to several", but that is the only fact relied upon which occurred after May 2, 1965.

The Court of Appeals recognized "a wealth of evidence that the company had been aggressive in its opposition to the union in the past." It was this evidence which was used by the Board as the basis for its conclusion that a

legal hiring plan was discriminatorily motivated. Such use of the evidence was improper.

There has not been a specific finding in this case that the plan adopted by the Company to restaff its plant was discriminatory. However, the holding in this case necessarily implies that an employer has to choose a particular method to rehire or recall employees. The only legal requirement heretofore has been that a plan to recall, rehire, or restaff not be discriminatory. In *Breckenridge Gasoline Co.*, 127 NLRB 1462 (1960), the Board held that § 8(a)(3) requires only that an employer not discriminate against former employees in making new hirings. Therefore, it was incumbent on the Board in the instant case to show that the employees who were not reemployed were treated differently from those who were hired.

Discrimination requires a showing of disparity of treatment. *N.L.R.B. v. Murray Ohio Manufacturing Company,* 326 F.2d 509 (6th Cir. 1964). The Board made no attempt to determine whether the application of the Company's plan of reemployment resulted in disparate treatment. Apparently the Trial Examiner would have chosen a different plan because of his feeling that old employees are "better" than new ones, but his judgment or differing opinion cannot be used as a specific finding of disparate treatment. In fact the reemployment plan adopted by the Company was not discriminatory.

Since the restaffing plan was not discriminatory in operation, the Board has chosen to find that the *use* of the plan was discriminatorily motivated. There is no express finding made to this effect, but it is implicit in the finding that the failure to recall old employees was discriminatory. The Board arrived at this conclusion by examining evidence of events prior to the § 10(b) date, and concluding that in view of its earlier conduct, the Company was improperly motivated in its later action.

Such action by the Board would be proper if the prior conduct was considered merely as "background" to shed light on later events. But that is not the case here. Absent the evidence which falls outside the § 10(b) period, the record reveals only the use of a non-discriminatory hiring plan, and two isolated § 8(a)(1) violations. It is clear that but for the evidence occurring outside the § 10(b) limit, no violation could be found. The Board's finding of a violation of Section 8(a)(3) is inescapably grounded on the events predating that limitation period. This Court has held that this is directly opposed to the purposes of § 10(b) of the Act.

In *Local No.* 1424, *International Machinists v. N.L.R.B.* 362 U.S. 411 (1960), this Court held:

> "[A] finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso." 362 U.S. at 422.

The Court explained the distinction between a situation to which this principle is applicable and one in which background evidence may be used:

> "It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the

> limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice." 362 U.S. at 416-17.

The situation before the Court in the instant case is barred by the statute. The decertification petition, the threats to close the plant, the plant closing itself, and the "wealth of evidence" to which the Court below referred, were facts which occurred more than six months prior to the filing of the charge. These events were not merely used as background information. They were obviously considered as controlling evidence. They were the acts upon which the Board relied in finding the failure to recall old employees to be a discriminatory act.

The Board itself has recognized the limitation which § 10(b) contains in a comparable situation. In *News Printing Co., Inc.*, 116 NLRB 210 (1956), the evidence contained facts which, standing alone, did not constitute violations of the Act. However, the trial examiner relied on an earlier case involving the same employer in order to infer a pattern of unlawful conduct. The earlier case involved conduct occurring more than six months before the filing of charges in the second case. The Board found that the trial examiner had not limited his consideration to background evidence, but had necessarily relied upon the earlier case as controlling evidence. It held:

> "While evidence, whether record or in the form of prior Board findings, concerning conduct which occurred prior to the statutory 6-month period may be utilized as background evidence to evaluate a

> Respondent's subsequent conduct, it is well established that Section 10(b) of the Act precludes the Board from giving independent and controlling weight to such evidence. Although the earlier *News Printing* case was admissible as background evidence, it was improper for the Trial Examiner to give it independent and controlling weight in determining whether the Respondent has discriminatorily denied wage increases to the Charging Parties in violation of the Act." 116 NLRB at 212

Both *Local No. 1424* and *News Printing* are applicable here. Each, in effect, held that there must be sufficient evidence in the record, within the § 10(b) period, to find a violation of the Act. That evidence may be explained by events predating the limitations period, but those events may not be given controlling significance.

Petitioner submits that the findings of the Board and the order of the Court of Appeals were inescapably grounded on conduct outside the six months period. This is contrary to the provisions of § 10(b) of the Act.

Question No. 2

The majority opinion of the Seventh Circuit in the instant case noted that the Board's affirmative bargaining order rested on the proposition that the Company's recall policy in July and August of 1965, by its very nature, was a violation of § 8(a)(5). The majority opinion also noted that the Board's bargaining order was based on the alternative ground of being proper to remedy the violations of § 8(a)(1) and (3). Although stating that both grounds "make sense" the majority chose to rest its decision only on the latter ground, holding that an affirmative bargaining order was the appropriate remedy for violations of § 8(a)(1) and (3).

The dissenting opinion recognized the unfairness of requiring the Company to anticipate that the § 8(a)(1) and (3) allegations of the complaint would ultimately be the

basis of a finding by the Board that § 8(a)(5) had been violated.

The dissenting Judge noted that the majority had granted enforcement to the Board's bargaining order on the theory that the affirmative bargaining order constituted an appropriate remedy for the violations of § 8(a)(1) and (3). Recognizing that only in exceptional cases is a bargaining order proper to remedy violations of § 8(a)(1) and (3), the dissenting opinion could not agree that this was such an exceptional case.

Various Courts of Appeals have issued divergent opinions on the question of whether an affirmative bargaining order is an appropriate remedy absent either a showing that the traditional remedies for the violation found would be inadequate or a finding that § 8(a)(5) had been violated.

The Third Circuit enforced a bargaining order in the absence of a § 8(a)(5) violation in *Piasecki Aircraft Corp. v. N.L.R.B.*, 280 F.2d 575 (3d Cir. 1960), *cert. denied*, 364 U.S. 933. A bargaining order was upheld by the First Circuit on a finding of § 8(a)(1) and (3) violations in *Editorial "El Imparcial" Inc. v. N.L.R.B.*, 278 F.2d 184 (1st Cir. 1960). The District of Columbia Circuit has enforced a bargaining order where it was supported only by findings of § 8(a)(1) violations. *United Steel Workers of America (Northwest Engineering Co.) v. N.L.R.B.*, 376 F.2d 770 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 932.

In contrast, the Second Circuit has held a bargaining order to be an inappropriate remedy for a § 8(a)(1) violation. *N.L.R.B. v. Flomatic Corporation*, 347 F.2d 74 (2d Cir. 1965). The Court there recognized that a bargaining order is "strong medicine," and cautioned that "its potentially adverse effect on the employees' § 7 rights must not be overlooked." 347 F.2d at 78. The Court elaborated:

> "Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility

that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act." 347 F.2d at 78

More recently the Second Circuit has again held that activities constituting violations of § 8(a)(1) do not, in themselves, justify the imposition of a bargaining order. *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967).

A bargaining order was held unenforceable in *River Togs* even though Board findings were upheld that the employer had been quoted by a supervisor in a speech to employees to the effect that he knew which employees had attended a union meeting, that he would close the plant before he would allow union organization, and that any employee who wanted a union could leave the plant. In addition, the employer had sent an employee to the union meeting for the purpose of taking pictures and later had reproached him in front of other employees for his failure to obtain such pictures. The employer also had told one of his employees not to bother purchasing a house because he would not be able to buy the house if he did not have a job and none of them would have jobs. These activities were held insufficient to justify the imposition of an affirmative bargaining order.

The Sixth Circuit has held insufficient to justify a bargaining order a finding of fourteen separate violations of § 8(a)(1), involving statements made by store managers to employees. *Peoples Service Drug Stores, Inc. v. N.L.R.B.*, 375 F.2d 551 (6th Cir. 1967).

The same rule was recently applied by the Fourth Circuit, in refusing to uphold a bargaining order where the employer had questioned employees about a union meeting and had made anti-union remarks and threats of loss of benefits if the union should win an election. *Crawford*

Manufacturing Co. v. N.L.R.B., 386 F.2d 367 (4th Cir. 1967), *cert. denied*, — U.S. —, 20 L. Ed. 286.

The affirmative bargaining order has been characterized by the Fourth Circuit as follows:

> "The remedy is an extraordinary one, however, and, in light of the guaranty of § 7 of employees' rights not to be represented, its use, if ever appropriate, must be reserved for extraordinary cases." *N.L.R.B. v. S.S. Logan Packing Company*, 386 F.2d 562, 570-571 (4th Cir. 1967).

The instant case affords an opportunity for this Court to examine the circumstances which will render a bargaining order appropriate to remedy § 8(a)(1) and (3) violations. The Company submits that having made such an examination this Court should conclude that the traditional remedies of reinstatement with back pay, notice posting, and cease and desist orders adequately remedy the violations found in this case.

There is no showing in this case that the traditional remedies will be inadequate to remedy the coercive effects of the unfair labor practices found. In the absence of such a showing, a bargaining order is inappropriate. *N.L.R.B. v. S. S. Logan Packing Company, supra.* With reinstatement, back pay and posting of notices, the Company's employees will be able to exercise all the rights guaranteed them under the Act. There is no showing that the exercise of such rights would be fruitless with respect to the selection of a bargaining representative. Presumably the order of reinstatement will be adequate to restore such union sympathy as existed before the unfair labor practices occurred. It is unlawful discharges and coercive statements that are to be remedied and not a refusal to bargain.[6] This fact is central to the question of the propriety of the

6. For the purpose of arguing the issues with respect to the bargaining order, the Company has not questioned the affirmation by the Court of Appeals below of the Board's § 8(a)(3) findings.

Seventh Circuit's enforcement of the Board's bargaining order in the instant case.

Because of the conflict in authority among the various Courts of Appeals with regard to the propriety of an affirmative bargaining order under the circumstances presented by the instant case, the Company respectfully submits that a writ of certiorari should issue and that this Court ultimately should deny enforcement of the Board's bargaining order.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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